CYPRUS AMAX MINERALS COMPANY

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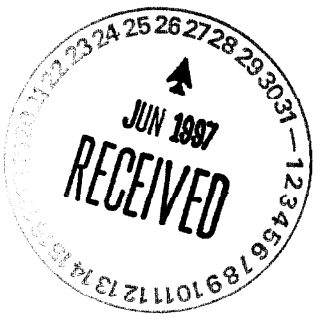

Mr. David S. Guzy
Chief, Rules and Publications Staff
Royalty Management Program
Minerals Management Service
P.O. Box 25165, MS 3101
Denver, Colorado 80225-0165

Re: Comments on Release of Third-Party Proprietary Information for the Administrative Appeals Process and for Alternate Dispute Resolution Proposed Rule

Dear Mr. Guzy:

On April 4, 1997 the Minerals Management Service (MMS) proposed to amend part 243 of its rules to provide third-party proprietary information to appellants and entities involved in administrative appeals and other Alternative Dispute Resolution (ADR) when that information is the basis for an MMS assessment (62 Fed. Reg. 16116). The comment period was extended until July 3, 1997 on June 2, 1997. (62 Fed. Reg. 29662) This letter provides Cyprus Amax Minerals Company's comments on the proposed rule, primarily regarding coal. Cyprus Amax holds federal coal leases in the states of Colorado, Utah and Wyoming and an Indian copper lease in the state of Arizona.

It is Cyprus Amax's position that no system should be established for the release of third-party proprietary information which would permit competitors to gain access to information that can be used in a manner that is inconsistent with antitrust statutes.

Cyprus Amax finds it surprising that the MMS is amending their rules to provide for the release of third-party proprietary information which was used as the basis for an MMS assessment. Our surprise comes for the fact that in valuing coal that is used as a feedstock in an enhancement process, 30 CFR § 206.265, the Royalty Valuation Division has consistently taken the position that the first benchmark in 30 CFR § 206.257(c)(2) can not be used to evaluate the reasonableness of the value submitted because it involves proprietary information. As discussed later, Cyprus Amax believes the MMS does not have the information to comply with 30 CFR § 206.257(c)(2)(i).

Interestingly, the MMS's current rules require them to use proprietary information to value coal that is not sold pursuant to an arm's-length contract, by using the first benchmark applicable in 30 CFR § 206.257(c)(2)(i-iv). In addition, 30 CFR § 206.265 requires that 30 CFR § 206.257(c)(2)(i-iv) be used to value coal which is enhanced after it has been placed in marketable condition. Using proprietary coal contract information in the future may certainly become more prevalent since no one knows how marketing within the coal industry will respond to the restructuring of the electric utility industry.

In addition, the MMS may have to use proprietary information to value coal advance royalty payments pursuant to 43 CFR § 3473.3-2(c), § 3483.4 and § 3485.2(a) under the Memorandum of Understanding dated September 6, 1991 between the Bureau of Land Management, Bureau of Indian Affairs and MMS.

The following responds to the specific requests for comments on questions one through seven regarding coal (62 Fed. Reg. 16117-8):

1. In the coal industry, the terms and conditions of coal contracts are unquestionably proprietary and the most likely source of information to be used as the basis for an MMS assessment in a nonarm's-length sale or use and for advance royalty payments. The contract would most definitely retain its proprietary status until it has expired, and in many instances, short term contracts could remain proprietary for a significant time after the expiration date since competitors may be able to determine a company's marketing strategy from the contract language.

   Unless the coal producer is selling coal to only one or two purchasers, the data elements reported on the MMS 2014 can not be associated with a particular coal contract.

   In the unlikely event that production information from the SMOR-A or B and the SMFR-A or B is used as the basis for an MMS assessment, the release of this information can be identified as customer specific in some instances.

2. For coal, the MMS should not release relevant proprietary information even if the requester signs confidentiality and liability agreements. As described above, the release of this information may provide competitors with information regarding marketing practices and it would be difficult to prove that the requester has not used the information in an unauthorized manner.

3. The MMS should notify the submitter of the proprietary information that such information has been requested. The submitter may be aware of some competitive situation involving the requester that the MMS is unaware of regarding the information requested.

4. On the surface the proposed safeguards appear adequate to protect the submitter's interest. However for proprietary coal sales information that is used to determine value in nonarm's-length transactions, this information would have to be reviewed by the marketing and market research personnel in the requesting company to mount an effective challenge to the information. Even though these individuals would sign a certification statement that they agree to be bound by the confidentiality and liability agreements, once exposed to a competitors marketing information it would become imbedded in their memory and could be used consciously or subconsciously in the future. In instances like this, proving the inappropriate use of the proprietary information would be very difficult.

   The submitter of proprietary information regarding coal that is requested should have the right to petition the MMS to deny the release of the information.

5. We continue to believe that proprietary coal contract information should not be released. As discussed below, we believe the MMS can implement the 30 CFR § 206.257(c)(2)(i) benchmark without using company specific information by i) amending that section to allow the use of the lessee's arms-length sales and ii) collect coal contract information from producers and issue a valuation guidance paper aggregating the information collected by producing region.

6. Based upon how the MMS interprets "persons directly assisting your counsel in" and "(t)hose persons in your employ directly" preparing the appeal or ADR, the proposed rule

may already be too restrictive. As discussed in 4 above, marketing and market research personnel would have to be involved in reviewing the proprietary information to determine if it was applicable to the requester's royalty situation.

7. The MMS should not charge fees for the relevant proprietary information based on the fee schedule used for FOIA requests at 43 CFR Part 2. Royalty payors should not have to pay for information that the MMS has used as the basis for an MMS assessment if this rule is adopted.

As discussed above the current MMS rules for coal require the use of proprietary information in valuing nonarm's-length sales or use and for coal which is enhanced after being placed into marketable condition. Ironically, the MMS does not collect the information they need to comply with their rules for valuing coal at the present time. The only information collected for coal is the monthly composite sales information for all contracts regardless of the date the contract was entered into. This information is insufficient to comply with the provisions of 30 CFR § 206.257(c)(2)(i).

In order to alleviate many of the concerns raised in these comments regarding proprietary coal sales contracts, Cyprus Amax urges the MMS to amend 30 CFR § 206.257(c)(2)(i) to allow, in the first instance, the use of the lessee's arm's-length contracts to support the value for a nonarm's-length transaction. Cyprus Amax believes that amending this section to allow the use of the lessee's arm's-length contracts to support the value for a nonarm's-length sale would eliminate the need to use third-party proprietary information in many instances.

Cyprus Amax believes the use of the lessee's arm's-length contracts is the best evidence of the comparable value of any nonarm's-length sale or use by the lessee. Since the rules currently require the use of the sales price of "like-quality coal produce in the area", what is more "like-quality" than the lessee's arm's-length sales?

The practice of using the lessee's arm's-length contracts to establish the "gross income from mining" for nonarm's-length sales is not a foreign concept to the U. S. Government. The Internal Revenue Service's Income Tax Regulation at 26 CFR § 1.613-4(c)(1)-(3) is used to establish "a representative market or field price" for nonarm's-length sales by the taxpayer (lessee) or if the taxpayer (lessee) processes the coal before sale by the application of nonmining processes (enhancements to the value of coal after the coal has been placed in marketable condition). Pursuant to 26 CFR § 1.613-4(c)(1) "(t)he taxpayer's (lessee's) own actual sales prices for ores or minerals of like kind and grade shall be taken into account when establishing market or field prices, provided that those sales are determined to be representative (arm's-length)."

In addition to the MMS amending 30 CFR § 206.257(c)(2)(i) to allow the use of the lessee's arm's-length contracts, the MMS should also require coal producers to report quarterly or semi-annual coal contract summary information. The information to be provided in the contract summary could consist of the following which is currently required by Wyoming:

1. Is the sale an arm's-length sale?
2. Date contract signed
3. Contract term
4. Contract or annual tonnage
5. Btu/lb.
6. Moisture content

7. Ash content
8. Sulphur content
9. Contract coal sizing requirements
10. Does contract price include primary crushing?
11. Is coal washed?
12. Transportation terms
13. Price per ton
14. Additional compensation received under contract (i.e. capital investment)

Since federal coal producers compete against each other in specific geographic areas (i.e. North Gillette, South Gillette, Montana, Southwestern Wyoming, Colorado, Utah, Raton Basin), the MMS can combine the contract summary information for the producers in each geographic region and issue a valuation guidance paper indicating the value of various coal qualities, similar to the coal price survey information published in Coal Outlook, produced in each region to be used for valuing similar nonarm's-length transactions within that region.

The MMS could form a standing coal valuation committee to review the valuation guidance paper before its release. The committee members from industry would have their marketing and market research personnel review the proposed values. Hopefully, industry would raise any concerns regarding the values at this time and eliminate potential future disputes on many nonarm's-length transactions. This would also give industry some assurance of the sales value to report on these transactions on a current basis and not be subject to surprises raised during audit.

Cyprus Amax is also against the release of third-party information to value copper production under Federal and Indian leases.

Cyprus Amax appreciates the opportunity to comment on this proposed rule. Please call me at (303) 643-5229 if you have any questions.

Sincerely,

William M Hartzler

William M. Hartzler
Tax Manager

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